

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 349 Water Resources Management

SPONSOR(S): Sirois

TIED BILLS: **IDEN./SIM. BILLS:** SB 198

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Environment, Agriculture & Flooding Subcommittee		Gawin	Moore
2) Agriculture & Natural Resources Appropriations Subcommittee			
3) State Affairs Committee			

SUMMARY ANALYSIS

The Department of Environmental Protection (DEP) regulates activities in, on, or over surface waters, as well as any activity that alters surface water flows, through environmental resource permits (ERPs). ERPs are required for development or construction activities typically involving the dredging or filling of surface waters, construction of flood protection facilities, building dams or reservoirs, or any other activities that affect state waters. Some projects are exempt from the requirement to obtain an ERP if they meet specific statutory restrictions. Environmental impact mitigation is required under certain circumstances to offset the adverse impacts to surface waters resulting from the construction activities allowed by an ERP.

Mitigation banking is a practice in which an environmental enhancement and preservation project is conducted by a public agency or private entity to provide mitigation for unavoidable environmental impacts within a defined region referred to as a mitigation service area. A mitigation bank consists of a wetland, stream, or other aquatic resource area that has been restored, established, or preserved to offset such environmental impacts.

Sovereign submerged lands include, but are not limited to, tidal lands, islands, sandbars, shallow banks, and lands waterward of the ordinary or mean high water line, beneath navigable fresh water or beneath tidally-influenced waters. The Board of Trustees of the Internal Improvement Trust Fund (Board) is responsible for determining whether a sale of sovereign submerged lands or a permit related to an activity conducted on sovereign submerged lands is within the public interest on a case-by-case basis. Before conveying submerged lands, the Board must consider the extent to which such conveyance would interfere with the conservation of fish, marine life and other wildlife, or other natural resources.

The bill authorizes the Board to grant easements for mitigation banks to ensure the protection and restoration of natural resources and to offset the unavoidable impacts of projects when mitigation banks meet the public interest criteria related to state owned lands. The bill specifies it does not prohibit mitigation to offset impacts to seagrass or other habitats on sovereignty submerged lands, upon meeting the public interest criteria.

The bill requires DEP to adopt and modify rules related to mitigation to ensure that the required financial assurances are equivalent and sufficient to provide for long-term management of permitted mitigation. Additionally, the bill requires DEP, in consultation with Water Management Districts, to include the rulemaking required by the bill in existing active rulemaking, or to complete rule development by June 30, 2023.

The bill expands the ERP permitting exemption for certain private and local government-owned docks by exempting a dock that measures a distance of less than 65 feet along the shoreline if the dock is the only one on the easement. The bill specifies that such docks must be granted authorization for the use of submerged lands upon approval by the Board.

The bill may have an indeterminate fiscal impact on the state.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

Environmental Resource Permits

The Department of Environmental Protection (DEP) regulates activities in, on, or over surface waters, as well as any activity that alters surface water flows, through environmental resource permits (ERPs). ERPs are required for development or construction activities typically involving the dredging or filling of surface waters, construction of flood protection facilities, building dams or reservoirs, or any other activities that affect state waters.¹ ERP applications are processed by either DEP or one of the state's water management districts (WMDs) in accordance with the division of responsibilities specified in operating agreements between DEP and the WMDs.²

ERP Exceptions

Current law provides exceptions from ERP³ permitting for certain types of projects.⁴ Generally, these permit exceptions restrict how the project is undertaken, provide size and location requirements, or provide for maintenance, repair, or replacement of existing structures.⁵ For example, state law provides exceptions from ERP permitting for the installation of overhead transmission lines with support structures that are not constructed in waters of the state and that do not create a navigational hazard, the installation and maintenance to design specifications of boat ramps on artificial bodies of waters where certain navigational access is provided, and the construction of private docks of 1,000 square feet or less of over-water surface area and seawalls in artificially created waterways when such construction will not violate existing water quality standards, impede navigation, or affect flood control.⁶ These exceptions do not relieve an applicant from obtaining permission to use or occupy lands owned by the Board of Trustees of the Internal Improvement Trust Fund (Board) or a WMD or from complying with local pollution control programs or other requirements of local governments.⁷

Included among the projects that are exempt from ERP permitting requirements is the installation and repair of mooring pilings and dolphins associated with private docking facilities or piers; the installation of private docks, piers, and recreational docking facilities; or the installation of piers and recreational docking facilities of local governmental entities when the entity's activities will not take place in any manatee habitat.⁸ This exemption applies when the dock:

- Has 500 square feet or less of over-water surface area for a dock located in an area designated as Outstanding Florida Waters or 1,000 square feet or less of over-water surface area for a dock located in an area that is not designated as Outstanding Florida Waters;
- Is constructed on or held in place by pilings or is a floating dock constructed so as not to involve filling or dredging other than that necessary to install the pilings;
- May not substantially impede the flow of water or create a navigational hazard;
- Is used for recreational, noncommercial activities associated with the mooring or storage of boats and boat paraphernalia; and
- Is the sole dock constructed pursuant to this exemption as measured along the shoreline for a distance of 65 feet, unless the parcel of land or individual lot as platted is less than 65 feet in length along the shoreline, in which case one exempt dock may be allowed per parcel or lot.

¹ South Florida Water Management District, *Environmental Resource Permits*, <https://www.sfwmd.gov/doing-business-with-us/permits/environmental-resource-permits> (last visited Nov. 22, 2021).

² DEP, *Submerged Lands and Environmental Resources Coordination Program*, <https://floridadep.gov/water/submerged-lands-environmental-resources-coordination> (last visited Nov. 22, 2021).

³ See chs. 373 and 403, F.S.

⁴ Section 403.813(1), F.S.

⁵ See s. 403.813(1)(a)-(v), F.S., see also r. 62-330.051, F.A.C.

⁶ *Id.*

⁷ Section 403.813(1), F.S.

⁸ Section 403.813(1)(b), F.S.

Environmental Impact Mitigation

Mitigation Regulations

Mitigation serves as the third step in a sequence of permitting actions⁹ that must be followed to offset the adverse impacts to surface waters resulting from the construction activities allowed by an ERP. When evaluating a proposed project for permitting, the Clean Water Act first requires DEP, as the permitting agency, to determine if the project would have an adverse impact. If the project has an adverse impact and there is a practicable alternative, the project must avoid the adverse impacts altogether and be reconfigured using the alternative. If impacts cannot be avoided, appropriate and practicable steps must be taken to minimize the impact. If any unavoidable impacts remain, they require appropriate and practicable mitigation.¹⁰

Mitigation usually consists of restoration, enhancement, creation, preservation, or a combination thereof and is accomplished by providing onsite mitigation, offsite mitigation, or purchasing mitigation credits from permitted mitigation banks. The ecological benefits of mitigation compensate for the functional loss resulting from the ERP impact.¹¹ The Uniform Mitigation Assessment Method (UMAM) provides a standardized procedure for assessing the ecological functions provided by surface waters, the amount that those functions are reduced by a proposed impact, and the amount of mitigation necessary to offset that loss. The UMAM evaluates functions by considering an ecological community's current condition, hydrologic connection, uniqueness, location, fish and wildlife utilization, time lag, and mitigation risk. The UMAM is also used to determine the degree of improvement in ecological value of proposed mitigation bank activities.¹²

Mitigation Banking

Mitigation banking is a practice in which an environmental enhancement and preservation project is conducted by a public agency or private entity (banker) to provide mitigation for unavoidable environmental impacts within a defined region referred to as a mitigation service area. A mitigation bank consists of a wetland, stream, or other aquatic resource area that has been restored, established, or preserved to offset such environmental impacts. The bank is the site itself, and the currency sold by the banker to the ERP applicant is a credit. The number of potential credits permitted for the bank and the credit required for ERPs are determined by DEP or a WMD. Mitigation banks are authorized by a state permit, which is issued by either a WMD or DEP depending on the location of the bank and the activity it mitigates, and by the United States Army Corps of Engineers.¹³

To obtain a mitigation bank permit, the applicant must provide reasonable assurance that the mitigation bank will:

- Improve ecological conditions of the regional watershed;
- Provide viable and sustainable ecological and hydrological functions for the proposed mitigation service area;
- Be effectively managed in perpetuity;
- Not destroy areas with high ecological value;
- Achieve mitigation success; and
- Be adjacent to lands that will not adversely affect the long-term viability of the mitigation bank due to unsuitable land uses or conditions.¹⁴

The applicant must also provide reasonable assurances that:

⁹ 40 C.F.R. § 230.

¹⁰ EPA, *Wetlands Compensatory Mitigation*, available at https://www.epa.gov/sites/production/files/2015-08/documents/compensatory_mitigation_factsheet.pdf (last visited Nov. 19, 2021).

¹¹ DEP, *Mitigation*, <https://floridadep.gov/water/submerged-lands-environmental-resources-coordination/content/mitigation> (last visited Nov. 19, 2021).

¹² DEP, *The Uniform Mitigation Assessment Method (UMAM)*, <https://floridadep.gov/water/submerged-lands-environmental-resources-coordination/content/uniform-mitigation-assessment> (last visited Nov. 19, 2021).

¹³ DEP, *Mitigation and Mitigation Banking*, <https://floridadep.gov/water/submerged-lands-environmental-resources-coordination/content/mitigation-and-mitigation-banking> (last visited Nov. 19, 2021).

¹⁴ Section 373.4136(1), F.S.; r. 62-342.400, F.A.C.

- Any surface water management system that will be constructed, altered, operated, maintained, abandoned, or removed within a mitigation bank will meet the requirements of part IV of ch. 373, F.S., which regulates management and storage of surface waters, and adopted rules;
- The applicant has sufficient legal or equitable interest in the property to ensure perpetual protection and management of the land within a mitigation bank; and
- The applicant can meet the financial responsibility requirements prescribed for mitigation banks.¹⁵

A banker applying for a permit to establish a mitigation bank must provide documentation of financial responsibility and financial assurance mechanisms for the construction and implementation of the bank, and the perpetual management and maintenance of the bank.¹⁶ This can be achieved by obtaining a surety or performance bond, irrevocable letter of credit, or insurance policy. The banker may also create an escrow account, standby escrow account, trust fund, or standby trust fund to fulfill this requirement. Fiscal responsibility mechanisms can be paid to a DEP designee, standby trust, or standby escrow.¹⁷ The banker is required to demonstrate continuous fiscal responsibility until all of the permit conditions are completely satisfied and approved for release by DEP.¹⁸ Further, the financial responsibility mechanisms must guarantee that the banker will perform all of its obligations under the permit.¹⁹

Seagrasses

Seagrasses are grass-like flowering plants that live completely submerged in marine and estuarine waters.²⁰ Seagrasses occur in protected bays and lagoons as well as in deeper waters along the continental shelf in the Gulf of Mexico.²¹ The depth at which seagrasses occur is limited by water clarity because most species require high levels of light.²² Florida's approximately 2.2 million acres of seagrasses perform many significant functions, including maintenance of water clarity, stabilization of the ocean bottom, shelter for marine life, and food for many marine animals and water birds.²³

The Board is vested and charged with the duty to acquire, administer, manage, control, supervise, conserve, protect, and dispose of lands owned by the state.²⁴ This duty extends to the preservation and regeneration of seagrass as an essential ecosystem for Florida's oceans, estuaries, and shorelines.²⁵ Current law requires the Board to manage state-owned lands in a manner that serves the public interest.²⁶

Sovereign Submerged Lands

Sovereign submerged lands include, but are not limited to, tidal lands, islands, sandbars, shallow banks, and lands waterward of the ordinary or mean high water line, beneath navigable fresh water, or beneath tidally-influenced waters.²⁷ Pursuant to Article X, section 11 of the Florida Constitution, the state holds title to land under navigable waters, including beaches below mean high water lines, in trust for all the people. Sale of such lands may be authorized by law, but only when in the public interest.²⁸ Additionally, the private use of portions of such lands may be authorized by law, but only when not contrary to the public interest.²⁹ The Board is responsible for determining whether a sale of sovereign

¹⁵ *Id.*; see also r. 62-340.700, F.A.C.

¹⁶ Rule 62-340.700, F.A.C.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ DEP, *Florida Seagrasses*, <https://floridadep.gov/rcp/seagrass> (last visited Nov. 19, 2021).

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ Section 253.03, F.S.

²⁵ Section 253.04(3)(a), F.S.

²⁶ Section 253.034, F.S.

²⁷ DEP, *Sovereign Submerged Lands (SSL) - Proprietary Authority versus Regulatory Authority in Chapter 18-21, F.A.C.*, <https://floridadep.gov/water/submerged-lands-environmental-resources-coordination/content/sovereign-submerged-lands-ssl> (last visited Nov. 19, 2021).

²⁸ Art. X, Sec. 11, FLA. CONST.

²⁹ Art. X, Sec. 11, FLA. CONST.

submerged lands or a permit related to an activity conducted on sovereign submerged lands is within the public interest on a case-by-case basis.³⁰ Before conveying sovereign submerged lands, the Board must consider the extent to which such conveyance would interfere with the conservation of fish, marine life and other wildlife, or other natural resources.³¹

Effect of the Bill

The bill authorizes the Board to grant easements for mitigation banks to ensure the protection and restoration of natural resources and to offset the unavoidable impacts of projects when mitigation banks meet the public interest criteria related to state-owned lands. The bill specifies that it does not prohibit mitigation to offset impacts to seagrass or other habitats on sovereignty submerged lands upon meeting the public interest criteria.

The bill requires DEP to adopt and modify rules related to mitigation to ensure that the required financial assurances are equivalent and sufficient to provide for the long-term management of permitted mitigation. Additionally, the bill requires DEP, in consultation with the WMDs, to include the rulemaking required by the bill in existing active rulemaking, or to complete rule development by June 30, 2023.

The bill expands the ERP permitting exemption for certain private and local government-owned docks by exempting a dock that is constructed on a recorded easement that measures a distance of less than 65 feet along the shoreline if the dock is the only one on the easement. The bill specifies that such docks must be granted authorization for the use of submerged lands upon approval by the Board.

B. SECTION DIRECTORY:

- Section 1. Amends s. 253.03, F.S., to authorize the Board to grant easements for mitigation banks.
- Section 2. Creates an unnumbered section of law requiring DEP, in consultation with the WMDs, to adopt and modify rules by June 30, 2023.
- Section 3. Amends s. 403.813, F.S., to allow an exception from ERP permitting requirements for certain docks constructed on recorded easements.
- Section 4. Provides an effective date of upon becoming a law.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

The bill may have an indeterminate insignificant negative fiscal impact on DEP related to the costs associated with the rulemaking requirements of the bill. These costs can likely be absorbed through current resources.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

³⁰ Section 253.12, F.S.

³¹ Section 253.12(2)(a), F.S.

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill may have an indeterminate fiscal impact on the private sector by allowing private entities to purchase mitigation credits on sovereign submerged lands, if approved by the Board, to offset their projects' unavoidable impacts to surface waters.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. This bill does not appear to affect county or municipal governments.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

The bill requires DEP to adopt and modify rules related to mitigation through existing active rulemaking or by June 30, 2023.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE CHANGES

Not applicable.